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No. 89-828

In the Supreme Court of the United States

OCTOBER TERM, 1989

L. ROBERT FRAME, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Beef Promotion and Research Act of 1985, 7 U.S.C. 2901 *et seq.*, constitutes a "regulation" of commerce, within the meaning of the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3.

2. Whether the Act impermissibly infringes petitioners' First Amendment rights.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A64) is reported at 885 F.2d 1282. The opinion of the district court is reported at 658 F. Supp. 1476.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on September 14, 1989. The petition for a writ of certiorari was filed on November 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Beef Promotion and Research Act of 1985, 7 U.S.C. 2901 *et seq.*, requires cattle producers and importers to finance a national beef promotional and research program by paying a one dollar assessment on each head of cattle sold in the United States. In enacting the statute, Congress declared it to be "in the public interest to authorize the establishment * * * of an orderly procedure for financing * * * and carrying out a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products." 7 U.S.C. 2901(b).

The Act directs the Secretary of Agriculture to promulgate a promotion and research order (7 U.S.C. 2901(b), 2903, 2904(8)(A)-(C)) which shall establish a Cattlemen's Beef Promotion and Research Board (Cattlemen's Board) and a Beef Promotion Operating Committee (Operating Committee) to administer the program. 7 U.S.C. 2904. Each person who purchases cattle from a cattle producer is designated as a "collecting person" under the Act and is required to collect the per-head assessment and to remit the assessments to a qualified state beef council or to the Cattlemen's Board. 7 U.S.C. 2904(8)(A); 7 C.F.R. 1260.311(a), 1260.312(c). Collecting persons are required to report to the Board specified information for each calendar month at the time assessments are remitted (7 U.S.C. 2904(11); 7 C.F.R. 1260.201, 1260.312(a)-(c)), and to maintain and make available for inspection by the Secretary the records necessary to verify the required reports (7 U.S.C. 2904(11); 7 C.F.R. 1260.202).

The Secretary is authorized to make investigations to determine whether any person subject to the Act has engaged in, or is about to engage in, any act that constitutes or will constitute a violation of the Act or the Beef Pro-

motion and Research Order. 7 U.S.C. 2909. Two enforcement mechanisms are provided for in the Act: (1) the Secretary, after an administrative hearing, may issue an order to restrain or prevent a person from violating the provisions of the Act and assess a civil penalty of up to $5,000 for any such violation; and (2) the Secretary may request that the Attorney General initiate a civil action to enforce, and to prevent and restrain a person from violating, any order or regulation promulgated by the Secretary under the Act. 7 U.S.C. 2908.[1]

2. Petitioners are a cattle auction house and L. Robert Frame, its owner. In November 1986, the United States brought this action in the United States District Court for the Eastern District of Pennsylvania to recover monies due from petitioners, arising from their failure to collect and remit assessments as required by the Act. Petitioners did not dispute their failure to comply with the Act. They contended, however, that the Act is unconstitutional, in that it unlawfully delegates the taxing power of Congress, violates rights granted by the First and Fifth Amendments, and exceeds the limits of congressional power to regulate commerce under Article I.

On April 30, 1987, the district court granted the government's motion for partial summary judgment, rejecting petitioners' constitutional challenges to the statute. See 658 F. Supp. 1476 (E.D. Pa.). The court found no violation of petitioners' right to free association, explaining that "[i]f

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[1] The Act provides that the continued operation of the promotional and research program is contingent upon the approval of a majority of producers and importers, as expressed by votes cast in a referendum. 7 U.S.C. 2906. A referendum was conducted on May 10, 1988, while this action was pending in the court of appeals, and the Secretary announced on May 27, 1988, that continuation of the program had been approved. See 7 U.S.C. 2906(a). Pet. App. A9, A21.

every individual had a constitutional right to refuse to 'associate' with a government program through the payment of taxes or some other valid exercise of Congressional power the ability of the government to enact controversial programs and effectuate the will of the majority would collapse." *Id.* at 1482. Moreover, the court added, because the speech involved in this case is "government speech," the First Amendment cannot be invoked "to limit the right of the government to express its views by requiring that the government allow any individual who disagrees with government speech to opt out of his obligation to contribute to its cost." *Ibid.* Finally, the court rejected petitioners' challenge under the Commerce Clause. "Clearly," the court observed, "the beef industry affects interstate commerce and is a proper object of congressional legislation." *Ibid.* What is more, the court added, "[t]he stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon." *Ibid.* (quoting *Wickard* v. *Filburn*, 317 U.S. 111, 128 (1942)).[2]

The district court ordered petitioners to "file all reports required by the Act within a reasonable period" and "to produce to the Secretary * * * such materials reasonably required * * * to determine [petitioners'] liability under the Act." 658 F. Supp. at 1483. On January 20, 1988, following submission of the required materials, the district court granted the government's motion for summary judgment and entered judgment against petitioners in the amount of $66,625.11 in uncollected assessments and late payment charges. See Pet. App. A11.

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[2] The district court also held that the statute does not unlawfully delegate the taxing power of Congress; that it does not effect an unlawful "taking" under the Fifth Amendment; and that it does not abridge petitioners' right to equal protection. 658 F. Supp. at 1479-1481.

3. The court of appeals affirmed by a divided vote (Pet. App. A2-A64). The court explained (*id.* at A12) that a statute falls within Congress's commerce power "if the activity being regulated affects commerce, and if there is a rational connection between the regulatory means selected and the asserted ends." In this case, the court noted (*id.* at A13), there is no dispute that beef moves through, and has a substantial effect on, interstate commerce. The court also rejected petitioners' claim that the statute does not "regulate" commerce, within the meaning of the Commerce Clause. The court noted (*ibid.*) that "[a] regulation of commerce includes a congressional attempt to bolster the public image of a product in order to increase consumer demand"; indeed, the court observed (*ibid.*), Congress has historically "regulated commerce by influencing the supply side of agricultural markets" through use of production quotas (see *Wickard* v. *Filburn*, 317 U.S. 111, 128 (1942)), low-interest loans to producers (see 7 U.S.C. 1447), and federal subsidies (see *United States* v. *Rock Royal Co-Op., Inc.*, 307 U.S. 533, 554-555 (1939)). Concluding that promotion and advertising, research, and consumer and industry information "are rationally related to the maintenance and expansion of the nation's beef markets," the court held that the Act "is a valid exercise of congressional power to regulate interstate commerce" (Pet. App. A16).

The court of appeals also rejected petitioners' First Amendment challenge to the statute (Pet. App. A20-A37). Relying on *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984), the court explained that the Beef Promotion and Research Act of 1985 must be sustained if it "was adopted to serve compelling state interests, that are ideologically neutral, and that cannot be achieved through means significantly less restrictive of free speech or associational

freedoms" (Pet. App. A30).[3] The court concluded that the Act easily met that standard. First, it held, the Act serves a compelling governmental interest: "preventing further decay of an already deteriorating beef industry" (*id.* at A31). The court observed that "[w]idespread losses and severe drops in the value of inventory have driven many cattlemen to bankruptcy, as well as to the abandonment of ranching altogether"; moreover, the court noted, "[a] continuation of this trend would endanger not only the country's meat supply, but the entire economy" (*id.* at A32). Second, the court held, the governmental interest was ideologically neutral, in that the "federal government seeks to bolster the image of beef solely to increase sales; it harbors no intent to 'prescribe orthodoxy' or 'communicate an official view' "(*id.* at A34). Finally, the court held that the Act effected only a "slight" interference with petitioners' First Amendment rights (*id.* at A35). The court noted that "the Cattlemen's Board is authorized only to develop a campaign to promote the product that the [petitioners] ha[ve] chosen to market" (*ibid.*). In that respect, the court added, the Cattlemen's Board—unlike the union involved in *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977)—"will not engage in activities that necessarily implicate a broad range of ideological, moral, religious, economic, and political interests, such as negotiation of wage increases, medical benefits, and limitations on the right to strike" (Pet. App. A35).[4]

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[3] The court did not accept the district court's conclusion that the promotional program constitutes "government speech," and for that reason does not infringe protectible interests under the First Amendment. Pet. App. A21-A29.

[4] The court of appeals also held that the statute did not violate petitioners' right to equal protection; that it did not effect an unlawful "taking"; that it authorized an action against collecting persons for

Judge Sloviter dissented (Pet. App. A52-A64). In her view, the Act violates petitioners' "First Amendment right to freedom to refrain from engaging in commercial advertising" (*id.* at A54). Although Judge Sloviter acknowledged that "the government has a general interest in the health of the beef industry," she stated that "it does not follow that the government has a substantial interest in compelling the beef industry to make and support such a promotion campaign" (*id.* at A60). Judge Sloviter was also "less persuaded than the majority that beef promotion does not implicate ideological concerns" (*ibid).* Finally, Judge Sloviter rejected the court's conclusion that the statute was narrowly tailored, stating that "there is absolutely no basis other than speculation from which one could conclude that the contributions compelled from those who choose not to make them are necessary to the beef promotion goal" (*id.* at A63).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. Petitioners first contend (Pet. 6-8) that the Beef Promotion and Research Act of 1985 does not fall within the commerce power because the statute is not a "regulation" of interstate commerce, within the meaning of the Commerce Clause. But this Court has never given so confining a definition to Congress's commerce authority. To the contrary, as this Court has made clear, the commerce power "extends not only to 'the use of channels of interstate or foreign commerce' and to 'protection of the instrumentalities

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uncollected assessments; and that it did not foreclose recovery of late-payment charges. Pet. App. A37-A52. The petition does not present those issues.

of interstate commerce * * * or persons or things in commerce,' but also to 'activities affecting commerce.' " *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-277 (1981). Here, Congress has "regulated" the beef industry by requiring it to spend a specified amount of money, in an effort "to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products" (7 U.S.C. 2901(b)). There is no doubt that such a measure—like many other similar measures enacted by Congress over the years (see Pet. App. A13)—constitutes a "regulation" of commerce. As the Court put the matter in *Wickard* v. *Filburn*, 317 U.S. 111, 128 (1942), the "stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon."

Petitioners contend (Pet. 8), however, that Congress does not "regulate" an industry when it "forces" industry members "to advertise industry product." The meaning of "regulate" cannot be limited on that basis. As the court of appeals recognized (Pet. App. A13-A14), Congress could have adopted the kinds of "direct" regulatory measures it has approved in the past—including price controls, production quotas, subsidies, and government purchases. That Congress instead chose a more indirect means of maintaining and expanding beef sales—through "promotion and advertising, research, consumer information, and industry information" (7 U.S.C. 2904(4)(A) and (B))—does not vitiate the essentially "regulatory" nature of the program.

2. Petitioners also challenge (Pet. 9-13) the court of appeals' disposition of their First Amendment claim. In particular, they quarrel with the court of appeals' application of the three-part test set forth by this Court in *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984), for assessing alleged infringements on the right to associate for expressive purposes.

As an initial matter, we think it doubtful that petitioners' First Amendment claim should be examined under the exacting *Roberts* standard. The government argued below, and the district court held, that promotional advertising by the Cattlemen's Board is "government speech" rather than private associational speech. If this characterization is correct,[5] then there can be no contention that a mandatory assessment designed to fund such speech violates petitioners' right of free association. See *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. at 259 n.13 (Powell, J. concurring). As the district court aptly noted, petitioners "are being required to 'associate' with the Beef Promotion Program no more than any taxpayer is required to associate with armed forces advertisements, Social Security, or the Voice of America." 658 F. Supp. 1482.

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[5] Although it admitted that the issue is "a close one" (Pet. App. A26), the court of appeals rejected this characterization. However, there are a number of features of the Act that distinguish the Cattlemen's Board from a private association that chooses to promote certain political or ideological beliefs. The Board was created by the Act, and its actions are subject to the complete control of the Secretary. 7 U.S.C. 2904(1); 7 C.F.R. 1260.141. For example, the Secretary appoints members to the Board (7 U.S.C. 2904(1)), approves the Board's budgets and contracts (7 U.S.C. 2904(4)(C)), and may remove any Board member if he "determines that the person's continued service would be detrimental to the purposes of the Act." 7 C.F.R. 1260.312. Moreover, the Act specifically directs the Board, through its Operating Committee, to "develop plans or projects of promotion and advertising" to be paid for by the assessments collected by the Board. 7 U.S.C. 2904(4)(B). In short, the Cattlemen's Board is an instrumentality designed to communicate the government's message regarding beef. As the district court concluded, "it would indeed be a strange result to invoke the [First Amendment] to limit the right of the government to express its views by requiring that the government allow any individual who disagrees with government speech to opt out of his obligation to contribute to its cost." 658 F. Supp. at 1482.

In addition, it is not clear that the *Roberts* test should be applied to what is essentially a form of commercial speech. At most, the Act "prescribe[s] what shall be orthodox in commercial advertising" (*Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985))—a type of intrusion of a far different order of magnitude than that at issue in *Roberts*, and one that is easily justified by the substantial governmental interests at stake. See, *e.g.*, *id.* at 651-653; *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. at 222-223.

But even if petitioners' First Amendment claim should be evaluated under the rubric of *Roberts*, petitioners' challenge to the court of appeals' application of that standard is unavailing. Petitioners first assert (Pet. 11) that "no reasonable person could maintain that an attempt to increase the sales of steaks and hamburger serves any compelling state interest." That formulation, however, substantially misstates the relevant issue. The issue is not whether the government can take steps to support and maintain the beef industry—surely it can; rather, the question is whether a system of mandatory assessments interferes with petitioners' First Amendment rights by forcing them to associate with a promotional program with which they disagree. Thus, the relevant question under the first branch of the *Roberts* test is whether the government has a sufficient interest in making the system of assessments mandatory rather than voluntary.

In a closely analogous context, this Court has held that government-imposed union shop requirements are supported by sufficiently weighty interests to overcome any resulting impingement upon associational freedoms. *Ellis* v. *Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435, 455-457 (1984); *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. at 217-226. As the Court explained in *Abood*, a union shop rule assures that there will be an

adequate supply of common or joint goods such as "[t]he services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel" (431 U.S. at 221); the rule "has been thought to distribute fairly the cost of these activities among those who benefit" (*id.* at 222); and "it counteracts the incentive that employees might otherwise have to become 'free riders'—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Ibid.* Similar justifications apply to the system of mandatory assessments established under the Beef Promotion and Research Act. The Act is designed to ensure an adequate supply of certain common or joint goods that benefit the entire industry, specifically, research and promotional activities; it fairly distributes the costs of these activities among all participants in the industry; and it overcomes the problem of "free riders" that might otherwise doom to failure any system of voluntary contributions. Pet. App. A32.

Petitioners also dispute (Pet. 11-12) the court of appeals' conclusion that the statute is ideologically neutral, contending that the Act requires them to finance a viewpoint with which they disagree. But unlike *Wooley* v. *Maynard*, 430 U.S. 705 (1977)—on which petitioners rely (Pet. 11)—the statute is not designed to "foster[ ] public adherence to an ideological point of view" (430 U.S. at 715), nor does it attempt to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," such as the mandatory flag salute provision at issue in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943). Rather, like the union shop provisions upheld in *Abood* and *Ellis*, the Act funds activities directed to the advancement of the common economic interests of those who are participants in the industry, and does not permit the Board to "spend funds for the expression of political views,

on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties." 431 U.S. at 235. See 7 U.S.C. 2904(10) (funds collected by the Board may not be used "in any manner for the purpose of influencing governmental action or policy, with the exception of recommending amendments to the order").

Finally, petitioners assert (Pet. 11-12) that the Act is not narrowly tailored because it "seek[s] to increase demand by forcing citizens to speak" (Pet. 13). But as the court of appeals observed (Pet. App. A35), this Court has upheld union shop requirements that entail considerably more far-reaching instances of "required speech" than is reflected in the assessments imposed by the Board under the Beef Promotion and Research Act. See, *e.g.*, *Ellis*, *supra*; *Abood*, *supra*; *International Ass'n of Machinists* v. *Street*, 367 U.S. 740 (1961); *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225 (1956). Moreover, petitioners do not suggest how, consistent with its overall objectives, Congress could have adopted a more narrowly tailored statute than the one it chose to enact.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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